Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

WILLIAM L. AND CORREEN KAY MOUNKES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Tenth Circuit Court of Appeals err in allowing a two-point enhancement to the sentence of Mr. William Mounkes for obstruction of justice pursuant to U.S.S.G. § 3C1.1 based solely upon contradictory and uncorroborated testimony finding only it more likely than not Mr. Mounkes was untruthful.

2. Did the Tenth Circuit Court of Appeals err in allowing the decision of the trial court to stand in holding that failure to rule upon Defendant's motion for a one-point reduction for Correen Kay Mounkes based upon circumstances not contemplated by the sentencing guidelines pursuant to 18 U.S.C. § 3553(b) constitutes denial of the motion. Does the district court's failure to rule upon the motion of the Defendant constitute acquiescence or a tacit overruling of the motion.

PARTIES TO THE PROCEEDING

Petitioners

William and Correen Kay Mounkes, husband and wife
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Respondent

The United States of America

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JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Order on February 22, 2000, which is printed in Appendix A. On the 7th day of March, 2000, Petitioners filed a Petition for Rehearing Pursuant to Fed. R. App. Rule 40 which the Court of Appeals denied on the 23rd day of March, 2000. (Appendix B). This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and 28 U.S.C. § 2106.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES AND REGULATIONS INVOLVED IN THIS CASE

26 U.S.C. § 7201

18 U.S.C. § 3553(b)

U.S. Sentencing Guidelines Manual § 3C1.1 (1992)

U.S. Sentencing Guidelines Manual § 3E1.1 (1992)

Fed. R. Crim. P. 33

The Fifth and Sixth Amendments to the Constitution of the United States of America.

STATEMENT OF THE CASE

The facts of this case are uncomplicated and straightforward. Petitioners were convicted in the United States District Court for the District of Kansas of four tax violations for tax years 1991 and 1992. Each defendant was convicted of two individual tax violations and two corporate tax violations for failure to report income in violation of 26 U.S.C. § 7201. (Appendix C). Defendants are in the business of buying and selling used books, primarily textbooks. Mr. Mounkes purchases the books, usually for cash, and then sells them to distributors and to school bookstores.

Mr. Mounkes is 65 years old. By the nature of the business, he deals in large amounts of cash and numerous checks. His role in the business is to obtain the books for resale, deliver them for resale, collect funds, keep expense records and enter the checks and expenses into a computer. 66-year old Mrs. Mounkes' role was to do the year-end balances and reconciliations to provide to the tax preparer. The government alleges many of the checks received for the sale of books were not reported as income. The defense was premised upon lack of criminal intent due to incompetence of the Mounkes' tax return preparer, the Mounkes' lack of sophistication in dealing with an antiquated computer system, and having no bookkeeping skills or instruction. Although other issues

were raised before the Tenth Circuit Court of Appeals, the issues before the Supreme Court involve the trial court's enhancement of Mr. Mounkes' sentence by two points based upon the Court's finding of obstruction of justice pursuant to U.S.S.G. § 3C1.1. The Court below rules Mr. Mounkes' testimony to be "in direct" contradiction of government witnesses, specifically, Mr. Stan Buss (the tax preparer) and Paula Blanche (a corporate book buyer representative). The Court cited examples of such contradictory statements as "use of corporate funds [B.M.I. Corp.] for personal use and his request for payments under $10,000 from Amtext. . . . Mr. Mounkes expounded on this statement by providing examples of how the government's witnesses were wrong on their assessment of his activities." At sentencing, the defendant, Kay Mounkes, moved the Court for a one-point reduction based upon age, standing in the community, minimal involvement in the alleged criminal activity, health, and seeking to avoid destruction of the mom and pop business run by the Mounkes. The Court did not rule on the motion, nor did the Court comment on it.

ARGUMENT FOR GRANTING WRIT

ISSUE NO. 1: Did the Tenth Circuit Court of Appeals Err in Allowing a Two-Point Enhancement To The Sentence of Mr. William Mounkes For Obstruction of Justice Pursuant To U.S.S.G. § 3C1.1 Based Solely Upon Contradictory and Uncorroborated Testimony Finding Only It More Likely Than Not Mr. Mounkes Was Untruthful.

The Court enhanced Mr. Mounkes' total offense level by two points from a level 13 to a level 15 changing the presumptive sentence from 12 to 18 months to 18 to 24 months. The enhancement resulted in Mr. Mounkes being given six additional months incarceration. The Court ordered enhancement of the defendant's sentence because, in the language of the Court:

> Court: The defendant's testimony was in direct contradiction with the government's witnesses, Mr. Buss and Paula Blanche. Examples of such contradictions are statements made regarding his use of corporate funds for personal use and his request for payments under $10,000 from Amtext. The Court finds the defendant's testimony was designed to substantially affect the outcome of the case, and his statements were not a matter of confusion, mistake or faulty memory. Mr. Mounkes's testimony was not taken akin to an exculpatory role, but rather his statements are viewed as willful attempts to obstruct the administration of justice. Mr. Mounkes expounded on his statements by providing examples how the government's witnesses were wrong in their assessment of his activities.
>
> In making the finding that the enhancement pursuant to U.S.S.G. Section 3C1.1 is appropriate, the Court has viewed Mr. Mounkes's statements in the most favorable light, yet the Court is clearly convinced it is more likely than not that the defendant has been untruthful. See *United States v. Onumonu*, 999 F.2d 43 (2nd Cir. 1993).

Sentencing Transcript, p. 12:20-13:19 (Appendix G).

The Court's Order did not discuss Mr. Mounkes' cooperation during the lengthy IRS investigation, nor his following of all Court rules and conditions of bond. The Court relied solely upon Note 3(b) of Guideline 3C1.1 (Appendix E) and found "the defendant committed, suborned, or attempted to suborn perjury." The other examples of type of conduct to which the adjustment applies were clearly inapplicable. The Court, based solely upon differences of testimony and no corroborative evidence whatsoever, states: "Yet the Court is clearly convinced it is more likely than not that the defendant has been untruthful." (Appendix G). The finding of the Court is akin to saying a defendant will be penalized if the defendant goes to trial, is convicted, and exercises his or her Fifth Amendment privilege and testifies contrary to government witnesses. This chills any defendant's exercise of the vital constitutional guarantee to demand trial by jury. There exists a chilling effect already under the sentencing guidelines applied to defendants who go to trial. For all practical purposes, such defendants are not able to claim a two-point reduction for acceptance of responsibility except in the very rarest instances, pursuant to U.S.S.G. § 3E1.1. (Appendix F). If the trial court is allowed to make an upward departure in defendant's sentence of two points, this has an additional chilling effect on all testifying criminal defendants. The testimony in which the Court says the defendant committed perjury does not involve a direct contradiction of any witness. The defendant testified that a corporation's policies were not followed in his specific instance. There was no direct contradictory testimony by the government. In essence, Ms. Blanche, a witness of the government testified the

company policy was to do one thing; Mr. Mounkes testified he was told something different by another corporate representative, and he never talked to Ms. Blanche. (Appendix H). The person Mr. Mounkes talked to was never produced by the government. Additionally, Mr. Mounkes' testimony, as in Mrs. Mounkes' testimony, differed from that of their tax preparer, Mr. Stan Buss, regarding recollection of events. There is no corroboration for either testifying individual other than the tax preparer's notes appeared to contradict his own testimony. (Appendix J). The Mounkes' tax preparer, an ex-banker, was described as incompetent by defendant's expert. The trial court could not have evaluated the evidence in a light most favorable to the defendant as if such was done, no two-point enhancement could be made.

ISSUE NO. 2: Did the Tenth Circuit Court of Appeals Err in Allowing The Decision of The Trial Court To Stand In Holding That Failure To Rule Upon Defendant's Motion For a One-Point Reduction For Correen Kay Mounkes Based Upon Circumstances Not Contemplated By The Sentencing Guidelines Pursuant to 18 U.S.C. § 3553(b) Constitutes Denial of the Motion. Does The District Court's Failure To Rule Upon The Motion of The Defendant Constitute Acquiescence Or a Tacit Overruling of The Motion.

The petitioner challenges the Court's lack of ruling on a motion for downward departure. It is clear the defendants moved for a downward departure of one point which would have taken the defendant/petitioner Kay Mounkes from a level 13 to a level 12, thus making

her eligible for a split sentence. The downward departure of one point was requested because of Mrs. Mounkes' age, poor health, and minimal involvement. The law, as stated by the Tenth Circuit in their opinion, is as follows: (Appendix I).

> Under 18 U.S.C. § 3553(b) [Appendix D], a sentencing court may depart from the Guidelines if it "finds that there exists an aggravating and mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."
>
> * * *
>
> The district court did not indicate that it lacked authority to depart from the sentencing guideline range in sentencing Mrs. Mounkes. We therefore lack jurisdiction to review the district court's decision not to grant the departure.

It is respectfully submitted the Tenth Circuit applied a wholly inapplicable standard in the situation. This is not an issue in which the trial court failed to realize it did not have jurisdiction under the guidelines to deviate from the sentence, but the trial court, for reasons known only to the trial court, wholly ignored the motion and made no ruling one way or the other. Silence by the trial court cannot be considered as a tacit denial of the motion.

CONCLUSION

The Tenth Circuit Court of Appeals decision in this case is inconsistent with constitutional guarantees to the

petitioners under the Fifth and Sixth Amendments of the United States Constitution and constitutes a chilling effect on any defendant choosing to testify in his or her own defense in any criminal proceeding. The Tenth Circuit Court of Appeals' ruling allows the trial court to fail the rule on motions which by implication therefore denies tacitly all motions upon which the Court fails to rule.

The Petition for Writ of Certiorari should be granted in the interest of fundamental fairness to citizens charged with crimes in the United States District Courts in deciding to go to trial and testify in their own defense, as well as defendants making appropriate motions for departure within the sentencing guidelines.

Respectfully submitted,

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APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIAM L. MOUNKES AND CORREEN KAY MOUNKES, Defendants-Appellants.	)	No. 99-3096 & 99-3098

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D. Ct. Nos. 98-40032-01-DES & 98-40032-02-DES)

(Filed FEB. 22, 2000)

Thomas D. Haney, Fairchild, Haney & Buck, P.A., Topeka, Kansas, appearing for Defendants-Appellants.

Meghan S. Skelton (Alan Hechtkopf, with her on the brief), Attorneys, Tax Division, Department of Justice, Washington, DC, appearing for Plaintiff-Appellee.

Before **TACHA, McWILLIAMS,** and **KELLY,** Circuit Judges.

TACHA, Circuit Judge.

Defendants William L. and Correen Kay Mounkes appeal from the district court's order denying their motions for judgment of acquittal and for a new trial. Defendants also appeal the district court's two point enhancement of Mr. Mounkes's sentence and the district court's failure to rule upon their motion for a one point reduction of Mrs. Mounkes's sentence. We exercise jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, and affirm.

I.

Mr. and Mrs. Mounkes owned and operated Bill Mounkes, Inc. (BMI). BMI purchased used educational materials from professors and colleges and at government auctions, then sold the materials to distributors. One distributor, Amtext, sometimes sent defendants multiple checks to pay for a single shipment. Mr. Mounkes testified that somebody at Amtext advised him to request payment by multiple checks for sums over $10,000 in order to avoid IRS paperwork. Amtext's financial officer, Paula Blanche, testified that Amtext would break up payments only upon a payee's request. Ms. Blanche did not recall having spoken personally to Mr. Mounkes about multiple check payments.

On at least one occasion, Mr. Mounkes cashed multiple payment checks for a single shipment of BMI materials at different bank branches on the same day. On at least one other occasion, Mr. Mounkes cashed multiple checks at the same bank branch on different days. Mr. Mounkes testified that he knew about the IRS's $10,000

transaction reporting requirement but did not comply because he was concerned that filling out the reports would lengthen his already lengthy workdays.

Mr. and Mrs. Mounkes maintained both business and personal bank accounts. Stanley Buss, the Mounkeses' accountant, testified that he instructed the Mounkeses to keep their business and personal accounts separate. Mr. Mounkes testified that he did not recall being so advised.

The IRS audited the Mounkeses' personal income tax returns for 1989 and their personal and corporate income tax returns for 1991 and 1992. In the 1989 audit, IRS Agent Robert Tice found that the Mounkeses had deducted $10,000 in corporate expenses on their personal return. Tice testified that he explained to Mr. Mounkes that personal and corporate expenses must be kept separate and that the Mounkeses could properly receive payments from the corporation only in the form of wages or dividends. Mr. Mounkes testified that he had never heard of a dividend until trial.

In the 1991 and 1992 audits, IRS Agent Maria Espinoza employed the "bank deposits" method of determining unreported income. This method required that she compare the Mounkeses' bank deposits and nondeductible personal expenditures to the income reported on their tax returns for each audited year. Espinoza therefore had to establish a "cash on hand balance" for the beginning of each of those years. In BMI's 1991 corporate tax return, Mr. Mounkes reported that BMI's cash on hand was $1000 at the beginning and $296 at the end of the year. Mr. Mounkes also gave Espinoza a handwritten statement of personal cash on hand repeating what he

had reported for BMI. He further testified that he did not keep any additional cash at home or in his desk.

Espinoza ultimately found that the Mounkeses' bank deposits and personal expenditures significantly exceeded the amount of income they reported on their personal returns for 1991 and 1992. She testified that Mr. Mounkes blamed the discrepancies on Buss. Mr. Mounkes testified that he had told Buss that certain land and jewelry he purchased were corporate assets. Evidence at trial indicated otherwise, and Buss testified that he believed the assets to be personal on the basis of information that Mr. Mounkes had provided him.

A grand jury indicted the Mounkeses on four counts of attempting to evade personal and corporate income taxes in violation of 26 U.S.C. § 7201. A jury convicted both defendants on all four counts. The Mounkeses moved for a judgment of acquittal and a new trial, and the district court denied both motions. In sentencing the defendants, the trial court applied a two point enhancement to Mr. Mounkes's sentence for obstruction of justice pursuant to U.S. Sentencing Guidelines Manual § 3C1.1 (1998). Under 18 U.S.C. § 3553(b), the court did not rule upon the Mounkeses' motion for a one point reduction of Mrs. Mounkes's sentence on the basis of circumstances not contemplated by the sentencing guidelines.

II.

The Mounkeses challenge the denial of their motions for judgment of acquittal and for a new trial, arguing that the evidence of beginning on-hand cash balances was insufficient to support a guilty verdict. In determining

the sufficiency of evidence, we review the record de novo. *United States v. Urena*, 27 F.3d 1487, 1489 (10th Cir. 1994). We review the evidence to determine whether, if taken in the light most favorable to the prosecution, it is sufficient for a reasonable jury to find the defendants guilty beyond a reasonable doubt. *United States v. Jenkins*, 175 F.3d 1208, 1215 (10th Cir.), *cert. denied*, 120 S. Ct. 263 (1999). "The evidence supporting the conviction must be substantial and do more than raise a suspicion of guilt." *United States v. Anderson*, 189 F.3d 1201, 1205 (10th Cir. 1999) (internal quotation marks and citation omitted).

We review the district court's refusal to grant a new trial for abuse of discretion. *United States v. Quintanilla*, 193 F.3d 1139, 1146 (10th Cir. 1999). The trial court may grant a new trial if the interests of justice so require. Fed. R. Crim. P. 33. Motions for new trial are disfavored, however, and granted only with great caution. *Quintanilla*, 193 F.3d at 1146.

A jury convicted the Mounkeses of willfully attempting to evade personal and corporate income taxes in violation of 26 U.S.C. § 7201. To establish that offense, the government must prove 1) the existence of a substantial tax liability, 2) willfulness, and 3) an affirmative act constituting evasion or attempted evasion. *United States v. Meek*, 998 F.2d 776, 779 (10th Cir. 1993) (citing *Sansone v. United States*, 380 U.S. 343 (1965)). The Mounkeses argue that there was insufficient evidence to prove the first element.

To establish the first element, the government employed the bank deposit method of proof. The government's evidence showed that the Mounkeses' bank

deposits and cash expenditures exceeded their reported income after adjustments for applicable exemptions and deductions. Such evidence supports an inference that defendants had unreported income. *See United States v. Conaway*, 11 F.3d 40, 43 (5th Cir. 1993); *United States v. Ludwig*, 897 F.2d 875, 878 (7th Cir. 1990); *United States v. Abodeely*, 801 F.2d 1020, 1023 (8th Cir. 1986). This "indirect" method of proof is permitted because "direct methods of proof . . . depend on the taxpayer's voluntary retention of records," rendering "[p]roof of unreported taxable income by direct means . . . extremely difficult and often impossible." *Abodeely*, 801 F.2d at 1023. However, to distinguish between unreported, taxable income and those deposits and expenditures not derived from taxable income, the government still must establish the defendants' pre-income "cash on hand" with reasonable certainty, while negating other sources of nontaxable income during the same period. *Conaway*, 11 F.3d at 44. On the other hand, the government need not establish the "cash on hand" figure with mathematical exactitude. *Id.*; *see also Ludwig*, 897 F.2d at 880-81; *United States v. Boulet*, 577 F.2d 1165, 1170 (5th Cir. 1978).

Agent Espinoza testified at trial that she defined "cash on hand" for Mr. Mounkes when she sought his beginning cash balances. The record indicates that Mr. Mounkes then gave Espinoza a written statement of his cash on hand, and that statement was admitted into evidence. Mr. Mounkes testified at trial that he did not keep unreported cash at home or in his desk. Finally, BMI's corporate balance sheets and tax returns, which were admitted into evidence, precisely corroborated the figures

that Mr. Mounkes gave to Espinoza. Under these circumstances, the jury could quantify the Mounkeses' beginning cash on hand with reasonable certainty for 1991 and 1992. Thus the evidence, when taken in the light most favorable to the prosecution, was sufficient for a reasonable jury to find the Mounkeses guilty beyond a reasonable doubt. We therefore affirm the district court's denial of the Mounkes's motion for judgment of acquittal.

Because the Mounkeses based their motion for a new trial on the same claim as their motion for judgment of acquittal, we also conclude that the trial court did not abuse its discretion in denying their motion for a new trial. Nothing in the record indicates that the interests of justice required a new trial be granted.

III.

The Mounkeses also claim that the trial court erred in enhancing Mr. Mounkes's sentence by two points for obstruction of justice pursuant to U.S. Sentencing Guidelines Manual § 3C1.1 (1998). The district court must enhance the defendant's base offense by two levels if it finds that

> the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense.

Id. The obstruction of justice enhancement may be predicated upon a defendant's "committing, suborning, or attempting to suborn perjury." *Id.* cmt. 4(b). The court sentenced the Mounkeses under the 1992 version of the

sentencing guidelines and thus was required to evaluate Mr. Mounkes's statements "in a light most favorable to the defendant" in making its perjury determination. U.S. Sentencing Guidelines Manual § 3C1.1 cmt. 1 (1992), *amended by* U.S. Sentencing Guidelines Manual App. C. amend. 566 (1997).

Because the trial judge observed defendant's testimony, we give deference in reviewing the trial court's finding of perjury. *United States v. Yost*, 24 F.3d 99, 106 (10th Cir. 1995). However, "[w]hile we review the factual findings of the district court under the clearly erroneous standard, and while we give due deference to the district court's application of the guidelines to the facts, when that application involves contested issues of law, we review de novo." *United States v. Medina-Estrada*, 81 F.3d 981, 986 (10th Cir. 1996) (internal quotation marks and citation omitted).

A § 3C1.1 enhancement predicated upon perjury is appropriate when the sentencing court finds that the defendant has given "[i] false testimony [ii] concerning a material matter [iii] with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory." *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (citing 18 U.S.C. § 1621, the federal criminal perjury statute); *accord Anderson*, 189 F.3d at 1213. The sentencing court must "review the evidence and make independent findings necessary to establish [the elements of perjury]." *Dunnigan*, 507 U.S. at 95; *see also Anderson*, 189 F.3d at 1213 ("[I]n order to apply the § 3C1.1 enhancement, it is well-settled that a sentencing court must make a specific finding – that is, one which is independent of the jury verdict – that the defendant

perjured herself." (internal quotation marks and citation omitted)). The court need not recite the perjured testimony verbatim, however. *Medina-Estrada*, 81 F.3d at 987. Rather, "[t]he district court may generally identify the testimony at issue . . . so that when we review the transcript we can evaluate the *Dunnigan* findings of the elements of perjury . . . without having simply to speculate on what the district court might have believed was the perjurious testimony." *United States v. Massey*, 48 F.3d 1560, 1574 (10th Cir. 1995).

A.

The Mounkeses raise two objections to the district court's perjury enhancement. First, they contend that the district court did not follow the 1992 Sentencing Guidelines' requirement that testimony be evaluated in a light most favorable to the defendant. Rather, defendants imply that the district court followed the 1997 revision to this requirement, under which "the court should be cognizant that inaccurate testimony or statements sometimes may result from confusion, mistake, or faulty memory." *See* U.S. Sentencing Guidelines Manual App. C. amend. 566 (1997). We find no merit in this contention. The district court specifically noted that in enhancing Mr. Mounkes's sentence it had viewed his statements "in the most favorable light." (Appellants' Supp.App. Vol. 5 at 13.) Nothing in the record casts doubt upon this statement.

B.

The Mounkeses' second claim is that the sentencing court did not make independent *Dunnigan* findings. We disagree. Under *Dunnigan*, the sentencing court must find defendant's testimony false, material, and intended to affect the outcome of trial rather than a product of confusion, mistake or faulty memory. *See Dunnigan*, 507 U.S. at 94. The district court specifically cited two examples of Mr. Mounkes's testimony which in its judgment contradicted other persuasive trial testimony: (1) Mr. Mounkes's statements regarding personal use of corporate funds, which contradicted the testimony of Buss, the Mounkeses' accountant, and (2) Mr. Mounkes's testimony regarding why Amtext broke payments into increments smaller than $10,000, which the court found to contradict the testimony of Blanche, Amtext's financial officer. Contradictions in testimony support findings of falsehood. *See Anderson*, 189 F.3d at 1213-14; *United States v. Lowder*, 5 F.3d 467, 471-72 (10th Cir. 1993). While Mr. Mounkes's testimony does not appear to contradict Blanche's testimony directly,[1] his testimony does directly contradict

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[1] Mr. Mounkes testified that he asked Amtext to break up checks in payment of amounts exceeding $10,000 on the advice of an Amtext representative. Blanche testified that Amtext generally broke up payments only upon a payee's request. These assertions are not inconsistent. An Amtext employee could have advised Mr. Mounkes as to why he might prefer to have his payments broken up, and Mr. Mounkes could then have requested that the payments be broken up. However, Mr. Mounkes could not identify the Amtext employee who he claimed had given him the advice, and Blanche was not aware of any Amtext employee who did.

Buss's testimony. The district court therefore could conclude that Mr. Mounkes testified falsely.

The district court also expressly found that Mr. Mounkes's testimony was material and willful. Both the diversion of corporate funds to personal use and the structuring of payments to avoid IRS reporting requirements are "affirmative act[s] constituting evasion or attempted evasion" of income taxes. *See Meek*, 998 F.2d at 779. False testimony about such acts therefore would be material to the Mounkeses' prosecution for tax evasion. Finally, while there appear to be some indications of confusion as opposed to willfulness on Mr. Mounkes's part, these do not displace the deference we give to the trial judge, who was able to observe the defendant at trial and was best situated to determine whether Mr. Mounkes was merely confused or was being willfully evasive in order to avoid conviction. *See Yost*, 24 F.3d at 106.

In sum, we find that the sentencing court identified Mr. Mounkes's perjurious testimony and expressly evaluated this testimony in light of the three *Dunnigan* elements. Our de novo review of the district court's application of these elements reveals no misunderstanding of the law of perjury. Thus, we find no error in the sentencing court's enhancement decision under § 3C1.1.[2]

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[2] The Mounkeses also object to the perjury enhancement on the ground that there is insufficient contrary testimony in the record to warrant the sentencing court's determination. The Mounkeses argue that such an inadequately supported determination will have a chilling effect on future defendants who would otherwise testify in their own defense at trial. The Supreme Court addressed a similar argument in *Dunnigan*, and

IV.

Finally, the Mounkeses claim that the district court erred in failing to rule upon their motion for a one point reduction of Mrs. Mounkes's sentence on the basis of circumstances not contemplated by the Sentencing Guidelines. Under 18 U.S.C. § 3553(b), a sentencing court may depart from the Guidelines if it "finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The Mounkeses argued below that there were mitigating circumstances which warranted a downward departure in Mrs. Mounkes's sentence. The district court stated that it took Mrs. Mounkes's circumstances into consideration when it sentenced her, but did not explicitly rule on the motion for downward departure.

We "cannot exercise jurisdiction to review a sentencing court's refusal to depart from the sentencing guidelines except in the very rare circumstance that the district court states that it does not have any authority to depart from the sentencing guideline range for the entire class of circumstances proffered by the defendant." *United States v. Castillo*, 140 F.3d 874, 887 (10th Cir. 1998).

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concluded that a defendant's right to testify simply does not include the right to commit perjury. *See* 507 U.S. at 96. While a routine finding of untruthfulness based upon the verdict alone would impinge upon Mr. Mounkes's constitutional right to testify on his own behalf, *Anderson*, 189 F.3d at 1213, specific and independent findings of perjury which comply with the *Dunnigan* safeguards do not. *See* 507 U.S. at 96-97.

The district court did not indicate that it lacked authority to depart from the sentencing guideline range in sentencing Mrs. Mounkes. We therefore lack jurisdiction to review the district court's decision not to grant the departure.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	
v.	)	
WILLIAM L. MOUNKES; CORREEN KAY MOUNKES,	)	Nos. 99-3096, 99-3098
Defendants-Appellants.	)	

ORDER

Filed March 23, 2000

Before **TACHA, McWILLIAMS** and **KELLY**, Circuit Judges.

Appellants petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Illegible
Deputy Clerk

APPENDIX C

26 U.S.C. § 7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(Aug. 16, 1954, c. 736, 68A Stat. 851; Sept. 3, 1982, Pub.L. 98-248, Title III, § 329(a), 96 Stat. 618.)

HISTORICAL AND STATUTORY NOTES

Effective Dates

1982 Act. Section 329(e) of Pub.L. 97-248 provided that: "The amendments made by this section [amending this section and sections 7203, 7206, and 7207 of this title] shall apply to offenses committed after the date of the enactment of this Act [Sept. 3, 1982]."

APPENDIX D

18 U.S.C § 3553. Imposition of a sentence

(b) Application of guidelines in imposing a sentence. – The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences proscribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

APPENDIX E

SENTENCING GUIDELINES

PART C – OBSTRUCTION

§ 3c1.1. Obstructing or Impeding the Administration of Justice

If the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense, increase the offense level by **2** levels.

Commentary

Application Notes:

1. *This provision is not intended to punish a defendant for the exercise of a constitutional right. A defendant's denial of guilt (other than a denial of guilt under oath that constitutes perjury), refusal to admit guilt or provide information to a probation officer, or refusal to enter a plea of guilty is not a basis for application of this provision. In applying this provision in respect to alleged false testimony or statements by the defendant, such testimony or statements should be evaluated in a light most favorable to the defendant.*

2. *Obstructive conduct can vary widely in nature, degree of planning, and seriousness. Application Note 3 sets forth examples of the types of conduct to which this enhancement is intended to apply. Application Note 4 sets forth examples of less serious forms of conduct to which this enhancement is not intended to apply, but that ordinarily can appropriately be sanctioned by the determination of the particular sentence within the otherwise applicable guideline range. Although the conduct to which this enhancement applies is not subject to precise definition, comparison of the examples set forth in Application Notes*

3 and 4 should assist the court in determining whether application of this enhancement is warranted in a particular case.

3. *The following is a non-exhaustive list of examples of the types of conduct to which this enhancement applies:*

   (a) threatening, intimidating, or otherwise unlawfully influencing a co-defendant, witness, or juror, directly or indirectly, or attempting to do so;

   (b) committing, suborning, or attempting to suborn perjury;

   (c) producing or attempting to produce a false, altered, or counterfeit document or record during an official investigation or judicial proceeding;

   (d) destroying or concealing or directing or procuring another person to destroy or conceal evidence that is material to an official investigation or judicial proceeding (e.g., shredding a document or destroying ledgers upon learning that an official investigation has commenced or is about to commence), or attempting to do so; however, if such conduct occurred contemporaneously with arrest (e.g., attempting to swallow or throw away a controlled substance), it shall not, standing alone, be sufficient to warrant an adjustment for obstruction unless it resulted in a material hindrance to the official investigation or prosecution of the instant offense or the sentencing of the offender;

   (e) escaping or attempting to escape from custody before trial or sentencing; or willfully failing to appear, as ordered, for a judicial proceeding;

* * *

APPENDIX F

SENTENCING GUIDELINES

PART E – ACCEPTANCE OF RESPONSIBILITY

§ 3E1.1 Acceptance of Responsibility

(a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.

(b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.

(c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

Commentary

Application Notes:

1. *In determining whether a defendant qualifies for this provision, appropriate considerations include, but are not limited to, the following:*

   (a) voluntary termination or withdrawal from criminal conduct or associations;

   (b) voluntary payment of restitution prior to adjudication of guilt;

   (c) voluntary and truthful admission to authorities of involvement in the offense and related conduct;

   (d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense; and

(g) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

2. *This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily on pre-trial statements and conduct.*

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA, KANSAS

UNITED STATES OF AMERICA, Plaintiff, vs. WILLIAM L. MOUNKES, CORREEN KAY MOUNKES, Defendants.	)	CASE NO. 98-40032-01/02

SENTENCING HEARING
BEFORE
HONORABLE DALE E. SAFFELS
on
March 2, 1999

* * *

[12] THE COURT: Very well. The Court has examined this file and the pleadings, heard your arguments, and is now ready to rule on the objections.

The court's finding as to Government's Objection No. 1: Government's Objection No. 1 is sustained. Upon review of the defendant's testimony, the Court finds there is clear and convincing evidence the defendant was untruthful at trial with respect to material facts in this case. The defendant's testimony was in direct contradiction with the government's witnesses, Mr. Buss and Paula Blanche. Examples of such contradictions are statements

made regarding his use of corporate funds for personal use and his request for payments under $10,000 from Amtext. [13] The Court finds the defendant's testimony was designed to substantially affect the outcome of the case, and his statements were not a matter of confusion, mistake or faulty memory. Mr. Mounkes's testimony was not taken akin to an exculpatory role, but rather his statements are viewed as willful attempts to obstruct the administration of justice. Mr. Mounkes expounded on his statements by providing examples how the government's witnesses were wrong in their assessments of his activities.

In making the finding that the enhancement pursuant to U.S.S.G. Section 3C1.1 is appropriate, the Court has viewed Mr. Mounkes's statements in the most favorable light, yet the Court is clearly convinced it is more likely than not that the defendant has been untruthful. See *United States v. Onumonu*, 999 F.2d 43, (2nd Cir. 1993).

Court's finding as to Defendant's Objection No. 1: Defendant's Objection No. 1 is overruled. The Court finds that the probation office has appropriately applied the guidelines in this case. The Court does not view the defendant as accepting responsibility for the offense of [14] conviction and, therefore, the reduction under U.S.S.G. Section 3E1.1 (a) or (b) is not appropriate. The 10th Circuit has already addressed the issue regarding the special challenges to Section 3E1.1 on Fifth and Sixth Amendment grounds and has ruled that a reduction pursuant to U.S.S.G. Section 3E1.1 (a) and (b) does not constitute a penalty or enhancement of sentence. There is a difference between increasing severity of sentence for failure to demonstrate remorse and refusing to grant a

reduction from the prescribed base offense level. See *United States v. Rogers*, 899 F.2d 917 (10th Cir.); *United States v. Trujillo*, 906 F.2d 1456 (10th Cir.). Also see *United States v. Ross*, 920 F.2d 1530 (10th Cir.).

The Court finds as to Defendant's Objection No. 2, Defendant's Objection No. 2 is overruled. The Court finds that based on all the evidence in the case, United States probation officer has used the most conservative estimate to determine the base offense level. As the Court understands it, the defendant contends the tax loss could be as low as $57,284, which represents the defendant's estimate of the corporate tax loss [15] for the years in question. The Court finds that this contention is not supported by case law. See *United States v. Martinez-Rios*, 143 F.3d 662 (2nd Cir. 1998); *United States v. Harvey*, 996 F.2d 917 (7th Cir. 1993); *United States v. Wu*, 81 F.3d 72 (7th Cir. 1995). As the probation office has noted in their response to this objection, the sentencing guidelines address a specific issue of individual and corporate tax loss and call for those losses to be aggregated to determine the offense level. The Court is satisfied the guidelines have been accurately calculated in this case. Those are the findings of the Court.

Does the defense have anything to present prior to my delivering my proposed findings of fact and tentative sentence?

MR. HANEY: Your Honor, may it please the court, regarding the sentence, I would like to speak to that, and Mr. and Mrs. Mounkes would like to speak directly to the Court, but we have no evidence to present. But the Court can certainly give its presumptive finding.

THE COURT: We have time to do that under the objections. Would that be appropriate?

* * *

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA, KANSAS

UNITED STATES OF AMERICA, ---------- Plaintiff,	)	
vs.	)	
WILLIAM L. MOUNKES, CORREEN KAY MOUNKES, ---------- Defendants.	)	Case No. 98-40032-01/02

VOLUME II
TRANSCRIPT OF TRIAL
BEFORE
HONORABLE DALE E. SAFFELS
and a jury of 12
on
September 22, 1998

* * *

TESTIMONY OF PAULA BLANCHE

[109] A. Under 10,000, most likely. I'd have to look through there and see.

Q. The records will speak for themselves. And Amtext, I don't mean to embarrass you, isn't going to take part in any activity that's illegal, as far as you know?

A. No, sir.

Q. And none of these checks, the way they were presented, were illegal?

A. No, not to my knowledge.

Q. And whatever was said or by whom concerning why the checks were written the way they were or when they were, you didn't take part in that conversation yourself?

A. No, sir.

Q. Or can you tell me anyone at Amtext who would have talked to Mr. Mounkes about these checks?

A. Whoever he requested the payment from.

Q. You don't know who that would be?

A. No. There is an indication here of who set up the payment by a little code of the account rep in our office.

Q. And is there any way that we can look at these listings of checks and find out which ones may be wire transfers, which ones may be Com

* * *

[116] Q. How much would that be?

A. The amount paid out was $745,558.21.

Q. And in 1992 did that drop?

A. Yes, it did.

Q. Significantly?

A. Yes.

Q. To what figure in 1992?

A. The amount paid out – again, this isn't the amount he would have shipped within that year, but the amount we paid him was $117,535.13.

Q. And you yourself don't have any knowledge why that figure would be much lower in '92?

A. No.

Q. Did you have any dealings, as far as you can recall, telephone calls or communications with Mrs. Kay Mounkes?

A. Not that I know of.

Q. Okay. Thank you very much.

MR. HANEY: That's all.

THE COURT: All right. Do you have redirect?

MR. FARHANG: Yes, I do, Your Honor.

THE COURT: Please proceed.

REDIRECT EXAMINATION

BY MR. FARHANG:

* * *

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA, KANSAS

UNITED STATES OF AMERICA,	)	
---------- Plaintiff,	)	
	)	
vs.	)	CASE NO.
WILLIAM L. MOUNKES,	)	98-40032-01/02
CORREEN KAY MOUNKES,	)	
---------- Defendants.	)	

SENTENCING HEARING
BEFORE
HONORABLE DALE E. SAFFELS
on
March 2, 1999

* * *

[27] THE COURT: You may withdraw. Now we'll take up the case of Correen Kay Mounkes. Mr. Haney, do you have any comments or arguments you want to make to the Court at this time?

MR. HANEY: I do, Your Honor.

THE COURT: Very well.

MR: HANEY: Your Honor, regarding Mrs. Mounkes, we would make the same requests that we have made earlier regarding Mr. Mounkes as far as allowing Mrs. Mounkes to remain on appeal bond pending the outcome of that appeal, which the Court has allowed Mr. Mounkes to do, also.

THE COURT: I'm going to grant that, but I'm not going to grant the staggering of sentence. I don't think I have the authority to do that.

MR. HANEY: Okay, thank you, Your Honor. The fact that Mrs. Mounkes will be on appeal bond [28] moots many of the things I was going to say so I won't even get into those. Your Honor, in this case, I think that the government has readily argued to the Court that Mrs. Mounkes's involvement in this case was much less than how they perceive her husband's involvement in this case. She is right on the level of a Level 13. Of course, a Level 12 would allow for split sentences in this case. The amount of tax loss under the guidelines is right at the bottom end, $125,000 is $5,000 over a different level, and $95,000 below the next possible level. So we're right down – actually, on both defendants – but as far as Mrs. Mounkes is concerned, we're right down at the bottom of both these guidelines.

Given Mrs. Mounkes's limited exposure, lesser conduct as even argued by the government to the jury and as argued today to the Court, we believe it entirely appropriate for this Court to grant Mrs. Mounkes even a one-point reduction down to a Level 12 in light of her health, in light of her unblemished record for 65 years, in light of her service to the community as a teacher, in light of her lesser involvement in this case whatsoever. And there's been no [29] question she did not obstruct, even by the government's theory, that she did not obstruct anyone. That would allow Mrs. Mounkes to receive a lesser sentence than even the 12-month minimum that the guidelines provide and would allow her to remain in the home and attempt to run the business.

Although it's essentially now moot, Your Honor, in that the Court has indicated it will not issue a staggered sentence, I do want to advise the Court – I don't want to leave something hanging in the air that would appear to be inconsistent with what was testified to earlier – that Mrs. Mounkes, if she was allowed to run the business, would still be able to control the inventory, pay the bills, pay the invoices, maintain goodwill to the customers. She obviously can't haul hundred-pound boxes of books around herself but could run the business herself. Your Honor, that would be the defendant's request and that, certainly, based upon all the facts known.

And Mrs. Mounkes would also like to address the Court as to her particular condition and her family situation in support of our motion for, at [30] least, if not the minimum sentence which the Court can impose on the guidelines, even deviation down to one point which will allow a split sentence in this case.

THE COURT: Mrs. Mounkes, we'll hear you at this time.

* * *

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
TOPEKA, KANSAS

UNITED STATES OF AMERICA, ---------- Plaintiff,	)	
vs.	)	Case No.
WILLIAM L. MOUNKES, CORREEN KAY MOUNKES, ---------- Defendants.	)	98-40032-01/02

VOLUME III
TRANSCRIPT OF TRIAL
BEFORE
HONORABLE DALE E. SAFFELS
and a jury of 12
on
September 23, 1998

* * *

TESTIMONY OF STANLEY BUSS

[478] Q. The government did not ask you about this document, even though it was their own exhibit, No. 65. That should be in front of you, sir.

A. Yes. Okay, I have it here. This is the 1992 personal tax spreadsheet.

Q. And on the end of the first page on March 28th, 1992, is there a notation, Lindsay Auction, jewelry?

A. Yes.

Q. And it's listed on this one as miscellaneous, what type?

A. 468651. It's a personal.

Q. Personal. So it lists personal here?

A. Right.

Q. And you've mentioned on other reports that you received like a $910 as to jewelry in '92, that originally came in listed as corporate, but you adjusted it – reclassified it, rather, to personal?

A. That's correct.

Q. At some time did you become aware that there was a question of whether the IRS was actually questioning whether that jewelry was personal or corporate?

A. Yes.

[479] Q. Did you make notes to yourself, at some point in time, that must or need to show that the jewelry is owned by the corporation?

A. I don't recall that.

Q. Do you have your file that we talked about with you, sir?

A. I don't have the file.

Q. Just for your recollection first, Mr. Buss, let me hand you a document I have. Is that in your writing, sir?

A. Yes, it is.

Q. If you'd look through your file and see if that document is there, the original.

A. I've been through it once, I can't seem to locate it.

Q. Looks like it's on some lined paper, if that helps, sir. The heading is "1991 depreciation" at the top.

A. Here it is.

Q. Okay. Thank you. And what you've been looking through is a collection of documents which came from where, sir, what are those?

A. What, these files?

Q. Yes.

A. These are my work papers.

[480] Q. Your work papers?

A. Yes.

Q. And were those at some time turned over to agents or attorneys for the government?

A. Yes.

Q. When was that, sir?

A. Well, just recently I turned them over to them, but they've had access for sometime.

Q. So those have been in your possession until you just recently turned them over?

A. Right.

Q. I'd mentioned a notation in your file and some document called 1991 depreciation, where you wrote need to show owned by corporation jewelry. Am I correct?

A. Uh-huh, that's correct.

Q. When was that prepared?

A. I don't know, there's no date on the top.

Q. And again, that is your writing as it relates to $68,517 in jewelry?

A. That's right.

Q. Can you tell us the circumstances under which you prepared those notes in your writing, sir?

A. This is probably an initial workup that I made. And then after subsequently talking to [481] Bill and/or Kay I got my questions answered that the jewelry, in fact, was not corporation and was personal.

Q. Do you have any idea when this was prepared, sir?

A. I don't have any kind of date on it. I might point out that there are other items on here, support for the dozer, support for repairs expenses. These are my questions going through here as far as notes as reminders to follow-up on these items.

Q. Is it my understanding now that you're telling the jury that at some point in time you wrote a note that you need to show that the jewelry was corporate, $68,517, and that Bill or Kay Mounkes talked you out of that?

A. No. No.

Q. Okay. I misunderstand, I apologize.

A. What was your question?

Q. Why you wrote a note in your personal files of a need to show the jewelry was corporate and not personal?

A. Let me go back and tell you the heading on this column. See, the heading there says "dividends." If, in fact, the jewelry was

* * *